IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1977

No: 77-475

ROGER ALLSTAIR WILLIAMS FRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TOPICAL INDEX

TABLE OF AUTHORITIES

Federal

State

Statutes

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Roger Fry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit in this case was delivered by written Order, not reported, a copy of which is appended to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1977; a petition for rehearing and suggestion for rehearing in banc was denied on August 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is 21 U.S.C. §848 unconstitutional as APPLIED TO CONDUCT INVOLVING ONLY MARIJUANA?

A. Is due process violated by the application of the criminal sanctions contained in 21 U.S.C. §848 to conduct involving only marijuana?

B. Was petitioner denied due process of law by the trial court's denial of petitioner's motion to hold an evidentiary hearing to demonstrate the absence of harmful medical or social effects of marijuana, where petitioner's motion was accompanied by an offer of proof which, if unrebutted, would have established the absence of any rational basis for including marijuana offenses within the reach of 21 U.S.C. §848.

2. IS 21 U.S.C. §848 UNCONSTITUTIONAL IN THAT ITS PENALTY PROVISION INFLICTS CRUEL AND UNUSUAL PUNISHMENT WHEN APPLIED TO CONDUCT INVOLVING ONLY MARIJUANA?

A. Is the punishment provided for by 21 U.S.C. §848 cruel and unusual as applied to marijuana offenses, given the nature of the offense and the lack of danger to society.

B. Is the penalty provision of 21 U.S.C. §848 disproportionate to the penalties imposed for similar offenses in other jurisdictions?

C. Is the penalty provision of 21. U.S.C. §848 as applied to marijuana offenses grossly disproportionate to penalties applicable to other federal crimes?

3. Does 21 U.S.C. §848 violate equal protection guarantees in that its penalty provision inflicts the same extremely severe punishment for conduct involving only marijuana as provided for heroin, cocaine and other narcotic drugs.

A. Have marijuana offenses been arbitrarily and irrationally classified with heroin and other narcotics offenses for prosecution and punishment under §848?

B. Should marijuana be classified, if at all, as a schedule V drug, outside the reach of 21 U.S.C. §848?

C. Did the trial court erroneously deny petitioner's motion for an evidentiary hearing to demonstrate the existing misclassification of marijuana, where petitioner's motion was accompanied by an offer of proof which, if unrebutted,

would have established the arbitrariness of the inclusion of marijuana offenses within the reach of §848?

4. Did the trial court's denial of an evidentiary hearing regarding the medical and social effects of marijuana, when such motion was accompanied by an extensive offer of proof, constitute a denial of due process in that petitioner was foreclosed from establishing the factual basis for the constitutional attacks on 21 U.S.C. §848, as set forth in questions No. 1-3 above.

5. Is 21 U.S.C. §848 unconstitutional in that its sentencing provision violates the separation of powers mandate by foreclosing both judicial and executive exercises of their probation or parole authority?

6. As a matter of statutory construction, wherever statute 21 U.S.C. §848 refers to a specific separate statute (18 U.S.C. §4202) and excludes its application, what effect does the repeal of the referenced statute (18 U.S.C. §4202) have on the subsequent operation of the referring statute (21 U.S.C. §848).

A. Is the "no parole" provision of petitioner's sentence invalid in that 18. U.S.C. §4202, the parole provision was declared inapplicable to sentences imposed under §848, and was repealed prior to the imposition of appellant's sentence?

B. The repealed statute, 18

U.S.C. §4202 did not inflict a "penalty liability of forfeiture" and was therefore not "saved" by the provisions of 1 U.S.C. §109, nor in the holdings of Warden v. Marrero, 417 U.S. 653, (1974) or Bradley v. United States, 410 U.S. 605 (1973).

C. The repealed statute (18 U.S.C. §4202) had not been incorporated by reference into 21 U.S.C. §848.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . . ."

The Eighth Amendment of the United States Constitution provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTORY PROVISIONS

21 U.S.C. §848 provides:

> "(a)(1) Any person who engages in a continuing criminal enterprise shall be sen-

tenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States --

(A) the profits obtained by him in such enterprise, and

(B) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under sub-

section (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper."

1 U.S.C. §109 provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute."

Former Section 18. U.S.C. §4202 provided, in pertinent part:

> "A federal prisoner . . . may be released on parole after serving one-third of such term or terms, or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

(Repealed by the Parole Commission and Reorganization Act, effective May 14, 1976)

21 U.S.C. §812 (This provision is lengthy, and its pertinent text is set forth in Appendix II, pursuant to U.S. Sup. Ct. Rule 23(1)(d).

STATEMENT

1. Proceedings Below.

Petitioner Roger Fry was charged in a superseding indictment filed on February 5, 1976, in count one with conspiracy to distribute marijuana in violation of 21 U.S.C. §841(a) and §846, and in count two with conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. The indictment was returned in the Eastern District of Michigan, and the case set before the Hon. Charles W. Joiner.

Subsequent to his arraignment, petitioner filed motions to dismiss the superseding indictment, and to dismiss count two of the indictment, based on the unconstitutionality of the continuing criminal enterprise statute as applied to the conduct charged against petitioner. Accompanying the motions was a specific request for an evidentiary hearing regarding the medical and social effects of marijuana, and an extensive offer of proof relating to petitioner's proposed expert testimony and other evidence demonstrating the absence of harmful medical or social effects of marijauna.

On April 15, 1976, Judge Joiner denied the motions to dismiss, and also denied the request for an evidentiary hearing.

On July 12, 1976, petitioner withdrew his plea of not guilty, and entered a plea

of guilty to count two of the indictment, the continuing criminal enterprise charge, pursuant to an agreement under Rule 11, Federal Rules of Criminal Procedure.

On August 31, 1976, petitioner was sentenced to be committed to the custody of the Attorney General for ten years, without possibility of parole. On September 8, 1976, a timely notice of appeal was filed. On June 27, 1977, the judgment of the Court of Appeals was entered affirming the conviction, and a petition for rehearing was delivered by written order of August 25, 1977.

2. Jurisdiction

The jurisdiction of the Court rests upon 28 U.S.C. §1254(1); appellate jurisdiction was vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §§1291 and 1294, and Rule 4(b) of the Federal Rules of Appellate Procedure; notice of appeal from the judgment of the United States District Court for the Eastern District of Michigan was timely filed on September 8, 1976.

3. Facts.

Apart from the statement of proceedings above, the relevant facts in this

case are those contained in petitioner's offer of proof submitted below in support of his motions to dismiss the superseding indictment. The offer of proof specifically described the expert testimony and documentary evidence intended to establish a factual record that (1) marijuana is not a narcotic drug; (2) the use of marijuana is not addictive; (3) the use of marijuana has no short term or long term harmful side effects on the individual user; (4) the ordinary use of marijuana does not lead to the commission of crimes, acts of violence or the use of narcotics; and (5) that the use of marijuana poses no significant danger or threat to the lives, safety, liberty, property or welfare of the user or of other human beings. The purpose of proffering these evidentiary materials was to establish the factual record supporting the several constitutional challenges to the continuing criminal enterprise statute. In a very real sense, then, the crucial facts underlying the determination of petitioner's constitutional claims are not found in the record below, but were rather excluded by the District Court's refusal to hold evidentiary hearing.

ARGUMENT

1. 21 U.S.C. §848 IS UNCONSTITUTIONAL AS APPLIED TO CONDUCT INVOLVING ONLY MARIJUANA.

Petitioner contends that marijuana should be classified, if at all, under Schedule V of 21 U.S.C. §812, as the criteria defining that category are the only ones rationally and properly applicable to marijuana. Because the continuing criminal enterprise statute only applies to a series of offenses involving substances listed in Schedules I-IV of 21 U.S.C. §812, a determination that marijuana was unconstitutionally included in those schedules would invalidate the instant prosecution. Petitioner specifically asserts, and offered to prove below, (1) that marijuana has a low potential for abuse relative to the drugs in Schedule IV (short-acting barbituric hypno-sedatives); (2) that marijuana has several currently accepted medical uses in treatments in the United States; and (3) that abuse of marijuana would lead to only limited physical or psychological dependence relative to the drugs in Schedule IV.

Such proof that the properties of marijuana fell only within the above described criteria defining Schedule V -- would establish the invalidity of the instant conviction, in that offenses involving Schedule V substances are not included within the reach of §848. As §848 applies only to drug violations punishable as felonies, and Schedule

V offenses are misdemeanors under 18 U.S.C. §1, the question of the marijuana classification becomes a crucial question of fact. The fundamental due process issue involved, and the necessity of a complete factual predicate for its determination, has been extensively litigated in analogous circumstances, see United States v. Carolene Products Corp., 304 U.S. 144, 162 (1938); United States v. Carolene Products Corp., 323 U.S. 18 (1944); Milnot Company v. Richardson, 350 F.Supp. 221, 223-224 (S.D. Ill. 1972); Milnot Company v. Arkansas State Board of Health, 388 F.Supp. 901, 903 (E.D. Ark. 1975). The Carolene Products litigation provides an illuminating example of the proper role of the federal judiciary in assessing and reassessing the validity of due process challenges to statutory classifications and prohibitions. Although the Supreme Court had, on two prior occasions, upheld the Constitutionality of certain classifications and prohibitions under the Filled Milk Act, and affirmed convictions based on their breach, the courts were receptive to renewed evidentiary presentations by the purveyors of filled milk, and ultimately held that the burden of establishing the Act's unconstitutionality had been met:

> "While the Carolene cases upheld the constitutionality of the Federal Filled Milk Act against due process and equal protection arguments, this Court believes that changed circumstances render these authorities of little precedential value in assessing the validity of the Arkansas statute in 1974. In the 1938 Carolene case, the Filled Milk Act was upheld on the basis of

> findings made by Congress in 1923 that the substitution of vegetable fat for butter fat was injurious and nutritionally unsound. As stated, present knowledge indicates that these conclusions were erroneous and that filled milk with vitamins constitutes a nutritious and wholesome product.

Milnot Company v. Ark. State Bd. of Health, supra, 388 F.Supp. at 903.

Petitioner's citation to the Carolene Products litigation is primarily intended to focus the Court's attention on the legitmacy of the type of due process claim raised herein. The necessity for complete evidentiary presentation of recent scientific and medical findings is also amply demonstrated.

2. 21 U.S.C. §848 IS UNCONSTITUTIONAL IN THAT ITS PENALTY PROVISIONS INFLICT CRUEL AND UNUSUAL PUNISHMENT WHEN APPLIED TO CRIMINAL CONDUCT INVOLVING ONLY MARIJUANA.

The penalty provisions of 21 U.S.C. §848 constitute cruel and unusual punishment as applied to conduce involving only marijuana, in that (1) the punishment is excessive given the lack of harmful medical and social consequences of marijuana; (2) the punishment is disproportionately severe compared to penalties in other jurisdictions for similar offenses; and (3) the punishment is disproportionate to the penalties for other federal crimes of comparable severity.

Both state and federal jurisdictions have formulated and applied a several step

analysis to test a particular penal provision against the "precept of justice that punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 367 (1910). This "proportionality analysis" entails (1) a comparison with sentences for the same or similar offenses in other jurisdictions; (2) a comparison with sentences for other crimes of comparable severity within the jurisdiction; (3) the legislative purpose underlying the penal provision; and (4) "evolving concepts of justice and decency". See Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975), vacated and remanded for reconsideration of statutory modification sub nom. Perini v. Downey, 96 S.Ct. 419 (1975). See also in re Foss, 10 Cal.3d 910 (1974); People v. Ruiz, 49 Cal.App.3d 730 (1975) / striking down a California provision imposing a five year mandatory minimum term without parole eligibility for possession of marijuana with two prior convictions /, and In re Grant, 18 Cal.3d 1 (1976) / striking down a ten year mandatory minimum non-parolable sentence for sale of marijuana with two prior convictions /.

A. The Punishment is Cruel and Unusual as Applied to Marijuana Offenses, Given the Nature of the Offense and the Lack of Danger to Society.

That marijuana is a qualitatively different drug from heroin, cocaine, or other narcotics is a matter of consensus both in the medical literature and the courts. 1/ Moreover, it is equally recognized that the individual and social effects of marijuana

1/ See, e.g., U.S. v. Maiden, 355 F.Supp.

are virtually harmless compared to those of heroin and other narcotics. Although these presently well-established facts had not been so thoroughly documented at the time that 21 U.S.C. §848 was debated and passed by Congress, the overwhelming weight of authority currently acknowledges their fundamental correctness, and petitioner offered to so prove in the trial court.

B. The Penalty Provisions of 21 U.S.C. §848 are Disporportionate to the Penalties for Similar Offenses in Other Jurisdictions.

Appellant contends that the relevant reference point for this analysis is the penalty structure in the several states for the commercial distribution of marijuana. This reference point should be contrasted to that imposed for true narcotics offenses. Also, because the continuing criminal enterprise statute requires that at least two other drug offenses be proved as part of the offense, the analysis here will also examine any penalty augmentation or enhancement provisions based on prior convictions. While there are certain differences between proof of a continuing series of drug violations, uninterrupted by arrest and prosecution, and proof of prior convictions in addition to a present charge, appellant contends that the continuing criminal enterprise penalties are more severe than even those for the sale of marijuana with two or more prior convictions.

Footnote 1 (continued)
743, 748 (D. Conn. 1973) / "English, Lorentzen, Sinclair, and McCabe all invalidated statutes that classed marijuana as a narcotic, which it demonstrably is not."/

Because the federal statute is directed toward national drug problems, perhaps the most relevant other jurisdictions are New York and California, as the most populous states with drug problems of national scope.

In early 1973, New York Governor Rockefeller delivered his annual Message to the Legislature and proposed to overhaul the state's drug laws with the primary intention of imposing severe penalties on traffickers of dangerous drugs, which included heroin, hashish, LSD and amphetamines. Message to the Legislature, 1973, N.Y.Leg.Doc.No.1, at 16. With certain modifications, the Rockefeller drug law was passed, and has withstood challenges that the penalties violated state and federal prohibitions against cruel and unusual punishment. State v. Broadie, 332 N.E.2d 338 (1973). However, the structure of the admittedly harsh and punitive law clearly distinguishes between the enhanced penalties for heroin, cocaine, dangerous drugs and narcotics, on one hand, and marijuana, on the other. The present definitional statutes, New York Penal Law §220.00 et seq., provide a ten step gradation of drug offenses, for both possession and sale, using the criteria of type of drug and amount involved. Each of the gradations has been assigned a penalty classification, for which the range of punishment is prescribed in Penal Law §70.00. The harshest penalties attach to violations of Penal Law §220.43, Criminal Sales of Controlled Substances in the First Degree, classified as an A-I felony for which an indeterminate sentence is provided, as noted above, of a mandatory maximum of life imprisonment, and a mandatory minimun of more than fifteen years, but less

than twenty-five. Section 220.43 proscribes the sale of more than one ounce of a narcotic on one or more occasions, as well as the sale of more than 2880 mg. of methadone. Other offenses are defined for Criminal Sales of Controlled Substances in other degrees, and a total of 32 separate drug offenses carry a mandatory life maximum sentence, with the mandatory minimum varying from one to 25 years, depending on the felony classification. See New York Penal Law §220.

Marijuana penalties, on the other hand, were not escalated as part of the legislative scheme, and remained at their previous levels for sale and distribution. These drastically different penalty ranges reflect the legislative acknowledgement of a qualitative difference between marijuana offenses and hard drug offenses. This distinction has been maintained in subsequent judicial decisions analyzing the new penalty structure, see, e.g., People v. Morehouse, 364 N.Y.S. 2nd 108 (1976).

Comparing appellants's sentence for marijuana violations with marijuana penalties in New York, the disparity is egregious. The continuing criminal enterprise statute provides a maximum of life without parole, while New York Penal Law imposes only a fifteen year maximu. The very concept of a non-parolable life maximum for marijuana offenses is thoroughly irreconcilable with the

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2/ It should be noted that the mandatory life sentence has been struck down on Eighth amendment grounds in Carmona v. Ward, ___F. Supp.__ (S.D.N.Y.1977) (21 Crim.L.Rptr.1085).

medical, legal and penological research and experience of the past ten years. The ten year mandatory minimum of 21 U.S.C. §848 is even more disproportionate to the New York minimum of one year. As appellant was sentenced to the mandatory minimum, without possibility of probation or parole, it is this provision whose invalidity appellant particularly asserts. The New York minimum under the revised statute remains at one year, in sharp contrast to the ten year provision in §848.

Under California's present fixed term system, the sale of marijuana will receive a sentence of two, three or four years, while the sale of heroin or cocaine will receive a fixed term of three, four or five years, with no probation available for amounts of heroin in excess of ½ ounce. Probation is available, of course, for all marijuana offenders.

Virtually all other state jurisdictions impose significantly less severe penalties for the most aggravated conduct involving marijuana, as petitioner demonstrated below by a comparative table of state statutes.

C. The Penalties Provision of §848 as Applied to Marijuana are Grossly Disproportionate when Compared with Penalties for Other Federal Offenses.

Federal Law prohibits and imposes criminal sanctions on a wide range of conduct, including certain acts which must be considered extremely dangerous both to specific victims, e.g., white slavery (18 U.S.C. §2421); air piracy (49 U.S.C. §1472), and also to the very concepts of federal author-

ity and sovereignty, e.g., treason (18 U.S.C. §2381), interestate racketeering (18 U.S.C. 1951-1962), etc.

However, the penalties for these crimes, whose severity clearly surpasses the distribution of marijuana, fall short of the continuing criminal enterprose punishment. Specifically, there is no other federal crime which precludes parole considerations as section 848 does. There are only two other penalty provisions imposing a mandatory minimum term of ten years or more, but these do not include a "no-parole" provision. Finally, there is no federal prohibition, including the assassination of a president, (18 U.S.C. §1751) which renders a prisoner ineligible for parole for a longer perior than ten years. 18 U.S.C. 4205(a).

Appellant has selected an illustrative array of federal criminal statutes and their respective penalty provisions to demonstrate the unusually harsh effect of 21 U.S.C. §848.

Treason, 18 U.S.C. §2381, is punishable by a term of at least five years, but the prisoner is eligible for parole in one third of the fixed term, not to exceed ten years. 18 U.S.C. §4205(a).

The knowing use of explosives to kill, injure, intimidate or damage, 18 U.S.C. §844, is punishable by a maximum term of ten years if no injury results; a maximum of 20 years if injury to a person is incurred; and a maximum of life imprisonment if the use results in death. Again, there is no minimum for any of these crimes, and the prisoner will be eligible for parole in no more than

ten years even with the imposition of the maximum penalty.

It should be particularly noted that other federal statutes directed against "organized crime" carry penalties far less severe than that provided for 21 U.S.C. §848. Chapter 95 of Title 18 defines "Racketeering" offenses, including the Hobbs Act, 18 U.S.C. §1951, which proscribes interference with interstate commerce by threats, violence, robbery, injury of extortion, and provides a maximum term of imprisonment of twenty years. Similarly 18 U.S.C. §1955 punishes the managers of gambling operations with a five year maximum.

The most comprehensive organized crime prevention and control statutes, 18 U.S.C. §1961 et seq., imposes a twenty year maximum for person engaged in a pattern of racketeering activity, defined as "any act(s) or threat(s) involving vurder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs".

3. 21 U.S.C. §848 VIOLATES EQUAL PROTECTION GUARANTEES IN THAT ITS PENALTY PROVISION INFLICTS THE SAME EXTREMELY SEVERE PUNISHMENT FOR CONDUCT INVOLVING MARIJUANA AS PROVIDED FOR HEROIN, COCAINE AND OTHER NARCOTIC DRUGS.

The continuing criminal enterprise statute is applicable to any continuing series of felony drug violations, regardless of the type of proscribed drug or drugs involved. 21 U.S.C. §848 criminalizes violations of subchapters I or II of Chapter 13 which involve any of the widely disparate substances

enumerated in Schedules I-IV of 21 U.S.C. §812. However, unlike the statutes prescribing differential penalties for the underlying substantive offenses, depending on type of substance, §848 imposes an indiscriminate and extremely harsh punishment on all offenders. While the maximum term of imprisonment for component marijuana violations in five years, or one third of the maximum for heroin violations, the §848 punishes the first-time marijuana violator with the same ten year mandatory minimum term of imprisonment, without possibility of probation or parole, as is applicable to the heroin violator. It is this undiscriminating application of a single punishment of extreme severity to offenses of significantly disparate seriousness that provides the crux of appellant's equal protection claim. The claim is further bolstered by the exclusion of drug violations involving Schedule V drugs from the reach of 21 U.S.C. 848 (b)(1), in that marijuana, because of its properties, physiological effects, and social impact, should be classified, if at all, in Schedule V.

The following principles set forth the framework for equal protection analysis. First, it is acknowledged that the legislature needs only a rational basis to regulate or proscribe a type of conduct, unless that conduct itself involves the exercise of a fundamental constitutional rights. See, e. g., Harper v. Virginia Board of Elections, 383 U.S. 663, 677 (1966) / rationally based poll tax impermissibly infringed right to vote /. For purposes of this argument, appellant does not contend that conduct involving commercial distribution of marijuana is in itself constitutionally protected,

although this position is not without judicial recognition and approval.3/ However, while only a rational basis need by established to sustain the regulation of conduct to which constitutional protections do not intrinsically inure, a reviewing court must apply strict constitutional scrutiny to any sanctions imposed on such conduct, if the sanctions themselves encroach on any constitutionally protected right, such as the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), or the right to liberty, as in this case. Where the governmental sanction involves only licensing or registration, the reviewing court need only find a rational basis to support the sanction. However, where the sanction entails an extreme deprivation of liberty, as in §848(a), as well as a potentially drastic deprivation of property, as in the fine and forfetiture sections of 848, the reviewing court must apply the strict standard to determine whether the single penalty classification inflicts an extremely severe penalty for offenses of such dissimilar nature that the relatively less serious offense receives constitutionally unequal punishment. In this case, assuming that the ten year mandatory minimum sentence, without possibility of probation or parole, is proportionate or or appropriate for the heroin dealer, its application to a marijuana offender, such as petitioner constitutes an equal protection violation. Just as the imposition of differential penalties on persons similarly situated with regard to the gravity of their

3/ See People v. Lorentzen, 387 Mich. 167,194 N.W.2d 827, 834 (1972)(Justice Kavanagh, concurring and dissenting, in striking down Michigan's marijuana sale penalty as cruel and unusual punishment).

offense violates equal protection, Skinner v. Oklahoma, supra, the infliction of the same harsh penalty on persons differentially situated with regard to the severity of their offenses deprives the less serious offender of equal protection.

The second prong of petitioner's equal protection argument is premised on the inclusino of certain types of drug offenses within the reach of §848 (offenses involving Schedule I-IV drugs) while excluding others, i.e., those involving Schedule V drugs. Petitioner contends, and offered to prove at the requested evidentiary hearing, that marijuana should be classified, if at all, as a Schedule V drug, when the criteria set forth in 21 U.S.C. §812 are applied to the true medical and social facts relating to marijuana. Thus petitioner contends not only that marijuana cannot rationally and constitutionally be classified with heroin offenses for penalty purposes, but also that marijuana should be classified, if at all, in a category outside the scope of §848 and its ten year mandatory minimum penalty.

The fact that a particular group of controlled substances (Schedule V substances) are exempted from the reach of §848 negates any argument that marijuana trafficking can be punished identically with heroin offenses under §848 because it is the continuing criminal activity that is being punished, not the transaction of a particular drug. Because Congress has exempted at elast one group of controlled substances from the reach of §848, it must be acknoweldged that the propriety of applying §848 to a particular type of drug trafficking is a question of fact. The exemption of Schedule V drugs from the reach

of §848 is equivalent to a Congressional declaration that drugs with (1) a low potential for abuse relative to the drugs in Schedule IV, (2) a currently accepted medical use in treatment in the United States; and (3) a limited capacity to induce physical or psychological dependence relative to Schedule IV drugs,4/ should not be subject to the drastic sanctions of §848. At this point, the propriety of classifying marijuana under Schedules I-IV, and thereby rendering marijuana traffickers liable to *848 penalties rather than with the excluded group of Schedule V drugs, becomes a question of fact. Petitioner offered to prove at the requested evidentiary hearing that marijuana should be classified, if at all, as a Schedule V drug, and evidentiary showing proffered below, if unrebutted, would vindicate equal protection claim.

Appellant's contention that marijuana should be classified if at all, as a Schedule V Drug rather than under any other category cannot be met by citation to either United States v. Maiden, 335 F.Supp. 743, 748 (D.Conn. 1973) or United States v. Kiffer, 477 F.2d 349, 355, 356 (2nd Cir. 1973). Both cases rejected equal protection challenges that marijuana was wrongly and unreasonably classified in Schedule I with heroin and other hard drugs. Both courts acknowledged that marijuana was not a narcotic and was significantly less dangerous to individuals and society than other Schedule I drugs. but held that no deprivation of equal protection resulted from the misclassification because the penalties for marijuana

4/ See 21 U.S.C. §812(b)(5)(criteria for Schedule V classification).

violations were individually prescribed. In this case, the current classification of marijuana in Schedule cover I rather than V dictates that a marijuana offender will suffer the some extremely severe mandatory minimum punishment also applicable to heroin and other narcotics offenses. Because each controlled substance must be categorized either within the reach of §848 (Schedule I-IV) or outside (Schedule V) the underlying factual basis for the classification presents an important equal protection question.

4. THE TRIAL COURT ERRONEOUSLY DEFINED PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING REGARDING THE MEDICAL AND SOCIAL EFFECTS OF MARIJUANA, THEREBY DEPRIVING PETITIONER OF DUE PROCESS OF LAW AND A FAIR OPPORTUNITY TO SUPPORT HIS CONSTITUTIONAL CHALLENGES SET FORTH ABOVE.

The denial of an evidentiary hearing, in the face of petitioner's compelling offer of proof and points and authorities, submitted below, has pervasively tainted the validity of appellant's conviction. The evidentiary materials to have been presented at the hearing were to provide the factual basis for three of appellant's crucial constitutional challenges:

1. Evidence of the lack of medical or social harm resulting from marijuana use was essential to challenge the constitutionality of prosecuting any marijuana offenses under 21 U.S.C. §848;

2. Evidence of the lack of medical or social harm resulting from marijuana use was essential to support the constitutional challenge to the §848 penalty provisions on cruel and unusual punishment grounds; and

3. Evidence of the medical and social effects of marijuana in comparison with the several types of other drugs both included and excluded from the reach of §848 was essential to support the constitutional challenge that the invidious discriminations among these drugs for penalty purposes deprived petitioner of

equal protection.

That the proffered evidence was material to each of these issues is clear. Equally clear is the resulting prejudice to appellant -- he was foreclosed from presenting the factual basis for his constitutional challenges, and his motions to dismiss was subsequently denied below. The remaining questions are (1) whether petitioner had a constitutional right to the evidentiary hearing, and (2) if so, what is the appropriate remedy for the denial of the right.

A factual analysis of the propriety and rationality of a statutory classification or prohibition has been held essential in the determination of a wide variety of statutory challenges analogous to those raised by appellant. First, where a statute is premised on a legislative declaration of facts, and the contention is posed that the state of facts no longer exists, an evidentiary hearing is necessary to determine the true facts at the time the statute is being applied. Chastleton Corp. v. Sinclair, 264 U.S. 543, 546-47 (1924) ["A law depending on an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed"]; Leary v. United States, 395 U.S. 6, 38 (1969) ["A state based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist"]. In the instant case, appellant challenges the legislative declaration accompanying the passage

of the Comprehensive Drug Abuse Prevention and Control Act, House Report No. 91-1444, 91st Congress, 2nd Sess., 1970 U.S. Cong. and Admin. News, p. 4566 et seq., particularly the sections on "Extent of the Problem" (id. at 4572) and "Consequences of Drug Abuse" (id. at 4573).

Next, the propriety of a statute must be reevaluated as the quantity and quality of scientific knowledge changes over time, even in the absence of an express legislative reliance on a particular state of facts. Brown v. Board of Education, 347 U.S. 483 (1954) ["Whatever may have been the extent of psychological knowledge (about the impact of segregation on education) at the time of Plessy v. Ferguson, this finding (of segregation's adverse effect) is amply supported by modern authority."] In this regard, the Legislative History of the Act acknowledges "great ignorance of the patterns of drug abuse", 1970 U.S. Cong. and Admin. News at 4574, and petitioner asserts that the ignorance is particularly egregious to the extent that it classifies marijuana use as "abuse", in light of present medical and sociological knowledge.

An evidentiary hearing is also required where a statute is attacked on the ground that it includes a particular art-

icle or substance within a classification where there exists a separate statutory classification in which the article or substance should rationally and properly be included. See People v. McCabe, ____ Ill. ____, 275 N.W. 2d 407, 408-09 (1971). An analogous contention has been raised by petitioner in that marijuana is included within the group of drugs which may be the subject of a continuing criminal enterprise charge, where the effects of marijuana are no more harmful than those of the Schedule V drugs excluded from the reach of 21 U.S.C. §848.

Finally, and perhaps most relevant to this inquiry is the principle set forth in United States v. Carolene Products, 304 U.S. 144, 153-54 (1938):

> "[W]e recognize that the constitutionality of a statute, valid on face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class as to be without the reason for the prohibition."

The course of the Carolene Products litigation demonstrates in analogous circumstances the constitutional necessity of ongoing judicial review of facts underlying a state classification or prohibition.

With regard to an appropriate remedy,

it is submitted that this Court either accept petitioner's offer of proof in determining the constitutional claims raised, or in the alternative, the appropriate remedy is a remand for the evidentiary hearing petitioner initially requested.

Where petitioner's constitutional claims turn on the proof of a particular set of facts, due process requires that petitioner be afforded the opportunity to establish a full factual record.

5. 21 U.S.C. §848 IS UNCONSTITUTIONAL IN THAT ITS SENTENCING PROVISION VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS MANDATE BY FORECLOSING BOTH JUDICIAL AND EXECUTIVE EXERCISE OF THEIR PROBATION AND PAROLE AUTHORITY.

The provisions of 21 U.S.C. §848(c) purport to foreclose the trial court from suspending the execution of any sentence imposed, and to foreclose the Bureau of Prisons from granting parole at any time during the service of the sentence. Because the mandatory minimum sentence is ten years (only 18 U.S.C. §2114, carries a longer minimum sentence) and the range of conduct apparently subject to prosecution under the statute, it is essential that the judiciary and the executive not be deprived of their capacity to effectively devise a reasonable penal program under the statute that is appropriate to a particular offender.

Petitioner argues that the legislature cannot derogate the authority and responsibility of the judiciary and executive to so act by providing for an extremely long minimum sentence, as it has done under §848. Even if the actual term of the sentence passes constitutional scrutiny under the Eighth Amendment, the attempt to insulate the sentence from the exercise of probation and parole opportunities is constitutionally untenable. The longer the term prescribed by the legislature, the more important it becomes that the judiciary and the executive be permitted to influence and affect the actual service of the sentence. Appellant argues that even if the legislature can properly formulate appropriate procedures and operating structures for probation (18 U.S.C. §3651 et seq.) and parole (18 U.S.C. §4201, et seq.), the legislative definition of the manner of judicial and executive participation in the sentencing process becomes an encroachment on their authority when a very long sentence is imposed and insulated from probation and parole options. This principle has been recognized in State v. McCoy, 94 Idaho 236, 486 F.2d 247 (1971), where the defendant was convicted of driving under the influence of intoxicating liquor, and the court suspended his sentence notwithstanding a statutory mandate of a ten-day jail sentence. The Idaho Supreme Court affirmed the suspension of sentence over the prosecutor's appeal agreeing that the separation of powers provision of the Idaho constitution prohibited the legislature from infringing the Court's inherent power. Drawing from Blackstone's

Commentaries and Hale's Pleas of the Crown, the Court held that the power to suspend sentence existed at common law and was inherent to the Court. The existence of the Court's inherent powers has also been recognized and affirmed in Hogan v. Bohan, 113 N.Y.S.2d 280 (1952), aff'd 305 N.Y. 110, 111 N.E. 2d 233 (1953).

6. THE "NO-PAROLE" PROVISION OF PETITIONER'S SENTENCE IS INVALID AND OF NO FORCE OR EFFECT IN THAT 18 U.S.C. §4202, THE PAROLE PROVISION REFERRED TO IN 21 U.S.C. §848, WAS REPEALED PRIOR TO THE IMPOSITION OF PETITIONER'S SENTENCE.

At the time of petitioner's guilty plea, and at the time of his sentencing, 21 U.S.C. §848(c) provided:

> In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18... shall not apply.

However, 18 U.S.C §4202, providing for parole eligibility for federal prisoners, was repealed by the Parole Commission and Reorganization Act, effective May 14, 1976, (the new Act is presently found at 18 U.S.C §4202 et. seq.).

At the time of both petitioner's guilty plea and sentencing, the existing 18 U.S.C §4202 did not delineate parole eligibility, but rather related to administrative matters. The parole eligibility provisions of the new Act are found at 18 U.S.C.§4205.

However, 21 U.S.C. §848 had not been amended in conformity with the new Act. As a consequence, petitioner contends that as a matter of statutory construction, the "no-parole" provision of his sentence is of no force and effect. The question presented is as follows: Where one statute refers to a specific separate statute and excludes its application, (as opposed to incorporating it by reference), what effect does the repeal of the referenced statute have on the referring statute.

At the outset, it should be noted that 21 U.S.C. §848(c) consists of a series of negatives. The statutory reference in §848(c) is an exclusion by reference, not a more common incorporation by reference. For this reason, the usual rule of statutory construction that the repeal of a statute incorporated by reference into another does not affect the adopting statute is not applicable.

Nor does the general savings clause (1 U.S.C.§ 109) operate to maintain the "no-parole" provision after the repeal of 18 U.S.C. §4202.

Warden v. Marrero, 417 U.S. 653 (1974), is not to the contrary. The Comprehensive Drug Abuse Prevention and Control Act of 1970 made parole available for almost all offenses which had carried "no-parole" provisions under the predecessor statute, 26 U.S.C. §7237. Marrero addressed the question of whether the parole ineligibility provisions of the predecessor statute survived the repealer, with the effect of foreclosing parole consideration for persons convicted of offenses prior to the date of the superseding Act.

The repealed statute contained language similar to that in §848(c). Marrero held, inter alia, that the general savings clause independently barred parole consideration because theparole ineligibility provision of §7237(d) was a "penalty, forfeiture or liability incurred under the statute" which did not abate with the repeal.

Marrero is inapplicable to petitioner's

argument in the instant case. The general savings clause operates to preserve only such penalties as were incurred under the repealed statute. Here, petitioner incurred the penalty of a non-parolable sentence under the continuing criminal enterprise statute. The repealed statute, 18 U.S.C. §4202, did not impose a penalty, but simply set forth the parole eligibility criteria. If §848 had been repealed, the general savings clause and the Marrero rationale would have preserved the "no-parole" provision with the rest of the statute, absent contrary legislation. Repeal of §848 would have been analogous to the repeal of former section 7237, discussed in Marrero. However, the repeal of the extrinsic parole eligibility provision, rather than the statute which defined the offense and imposed the penalties, does not trigger the general savings clause. See also Bridges v. UnitedStates, 346 U.S. 209 (1952) and United States v. Provenzano, 423 F. Supp. 662 (S.D.N.Y. 1976).

In conclusion, the reference in §848 to the inapplicability of former 18 U.S.C. §4202 is not given continuing vitality by either settled rules of statutory construction or the general savings clause, and consequently the "no parole" provision of petitioner's sentence must be stricken as invalid and without force and effect.

CONCLUSION

For the reasons stated, petitioner Roger Fry respectfully requests that the petition for writ of certiorari be granted, and that the judgement of the Court of Appeals be reversed.

DATED: SEPTEMBER 22, 1977

Respectfully submitted,

LAW OFFICES OF
BARRY TARLOW

by _____
BARRY TARLOW

Attorneys for
Petitioner

APPENDIX "A"

No. 77-5006

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

JUN 27 1977

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROGER ALISTAIR WILLIAMS FRY,

Defendant-Appellant.

O R D E R

Before; EDWARDS and CELEBREZZE, Circuit Judges, and ZIRPOLI,* Senior District Judge.

On receipt and consideration of an appeal in the above-styled case; and

Noting that appellant Fry pled guilty to conducting a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1970); and

Finding under the facts of this case that his 10-year sentence under § 848 cannot be considered violative of the cruel and unusual punishment prohibition in the Eighth Amendment to the United States Constitution; and

Further finding that § 848 as it applies to a conspiracy to import and sell marijuana in large quantities, as was charged in the indictment in this case, is not violative of the said Constitution on grounds of unreasonable or

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* Honorable Alfonso J. Zirpoli, Senior United States District Judge for the Northern District of California, sitting by designation.

arbitrary classification (See United States v. Kiffer, 477 F.2d 349 (2d Cir.), cert. denied, 414 U.S. 831 (1973); and

Further finding ourselves in agreement with the following paragraph from the Kiffer case:

> In sum, although one cannot read the thorough first report of the Shafer Commission without agreeing that there is an "extensive degree of misinformation about marihuana as a drug" and a need, in the words of the report, to "demythologize" and to "desymbolize" it, the question before us is a narrow one. It is whether it can fairly be said that Congress acted irrationally in prohibiting the commercial distribution of marihuana. We believe that the answer to that question is no. Therefore, appellants' constitutional attack upon that portion of the statute must fail. Accord, United States v. Rodriquez-Camacho, 468 F.2d 1220 (9th Cir. 1972).
>
> Id. at 355 (Footnote omitted.)

And finding no other appellate issues of arguable merit presented,

Now, therefore, the judgment of conviction is affirmed.

Entered by order of the Court

John A Itelson

Clerk

No. 77-475

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROGER ALSTAIR WILLIAMS FRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:

Page

Page

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1977. A petition for rehearing was denied on August 25, 1977. The petition for a writ of certiorari was not filed until September 26, 1977, and is therefore two days out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress acted irrationally in prohibiting the commercial distribution of marijuana.

2. Whether the penalty provisions of 21 U.S.C. 848(c), which apply to both marijuana and heroin distribution, and which exclude the possibility of suspension of sentence, probation, or parole, violate the Due Process or Cruel and Unusual Punishment Clauses as applied to a criminal organization distributing marijuana.

3. Whether petitioner is eligible for parole because the provision under which he was sentenced states only that the provisions of 18 U.S.C. 4202—which formerly governed parole eligibility—shall not apply, and does not reflect the fact that the parole eligibility provisions of Section 4202 have been renumbered as Section 4205.

STATEMENT

On February 5, 1976, a superseding indictment was filed in the United States District Court for the Eastern District of Michigan. The indictment charged that petitioner and others had conspired to distribute marijuana, in violation of 21 U.S.C. 841(a), and that petitioner had conducted a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Pet. 9). Petitioner moved before trial to dismiss the indictment; he contended that the statutory classification of marijuana is unconstitutional and requested an evidentiary hearing. The district court declined to hold a hearing and denied the motion on April 5, 1976.

On July 12, 1976, after his trial had commenced, petitioner pleaded guilty to the continuing criminal enterprise count.[1] The district court sentenced petitioner to ten years' imprisonment and provided, pursuant to 21

[1]A mistrial was declared on the distribution count.

U.S.C. 848(c), that the petitioner would not be eligible for parole under 18 U.S.C. 4202 (Pet. 9-10). The court of appeals affirmed (Pet. App. A).[2]

At the time of his guilty plea, petitioner admitted that he was "[s]upervising manager" of a complex organization that imported "[m]ulti-ton" quantities of marijuana from Mexico in oil tank trucks, that more than five persons were involved in this operation, and that the marijuana had been redistributed throughout the United States (App. 52b-84b).[3] According to petitioner, he had made a profit of approximately $12,000 per ton (*id.* at 69b), and although the operation was not continuous, whenever new supplies of marijuana became available through the Mexican sources, petitioner's organization worked steadily for two or three month periods (*id.* at 70b-71b). One of petitioner's distributors, Charles S. Hewett, testified that he paid petitioner approximately $1,750,000 for 14 tons of marijuana during the first seven months of 1973 alone (*id.* at 36b-37b).

ARGUMENT

1. Federal law establishes five schedules of controlled substances. 21 U.S.C. 812. Congress placed marijuana on Schedule I, which also includes narcotic drugs such as heroin.[4] Petitioner's contentions, although presented in

[2]The court of appeals reached the merits of petitioner's arguments despite the fact that he had pleaded guilty. But see *United States* v. *Sepe*, 486 F. 2d 1044 (C.A. 5) (*en banc*).

[3]"App." refers to the appendix to the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[4]Schedule I drugs are characterized by a high potential for abuse, no currently acceptable medical treatment use in the United States, and a lack of safety even under medical supervision. 21 U.S.C. 812(b)(1).

several ways, boil down to the argument that either the Constitution or other statutes require marijuana to be reclassified to Schedule V (Pet. 12).[5] If it were so reclassified, it would cease to be a drug within the reach of the continuing criminal enterprise statute under which petitioner was convicted. Moreover, other offenses in connection with Schedule V drugs are not felonies. See 21 U.S.C. 841(b)(3).

Petitioner's argument is insubstantial. Congress classified marijuana as a Schedule I drug principally at the suggestion of the Department of Health, Education, and Welfare, which recommended that the strict Schedule I controls were necessary until more was known about the effects of marijuana. See. H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Part 1, pp. 12-13, 61 (1970). The National Commission on Marihuana and Drug Abuse likewise concluded that, given the present state of knowledge regarding marijuana, strict control is justified; its first annual report states that marijuana "is not an innocuous drug. The clinical findings of impaired psychological function, carefully documented by medical specialists,

[5]Schedule V includes substances that (1) have a low potential for abuse relative to the substances in Schedule IV; (2) have a currently accepted medical treatment in the United States; and (3) if abused, will lead to limited psychological or physical dependence relative to the substances in Schedule IV. 21 U.S.C. 812(b)(5). The third possible placement for marijuana is Schedule II. Schedule II substances have (1) a high potential for abuse; (2) a currently accepted medical use in the United States; and (3) the potential to lead to severe psychological or physical dependence if abused. 21 U.S.C. 812(b)(2).

21 U.S.C. 812(b) states that the Attorney General may move a substance from one schedule to another on finding that it meets the characteristics for the new schedule. "[e]xcept where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part."

legitimately arouse concern." National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding* 90 (1972). The medical questions have not yet been resolved. See, *e.g., Sixth Annual Report to the United States Congress From the Secretary of Health, Education and Welfare: Marihuana and Health* (1976).

The evidence before Congress made it rational for the legislature to conclude that marijuana should be controlled strictly, and its placement in Schedule I does not violate the Due Process Clause. See, *e.g., United States* v. *Gramlich*, 551 F. 2d 1359, 1364 (C.A. 5); *United States* v. *Kiffer*, 477 F. 2d 349 (C.A. 2), certiorari denied, 414 U.S. 831; *United States* v. *Rodriquez-Camacho*, 468 F. 2d 1220 (C.A. 9), certiorari denied, 410 U.S. 985. As the court explained in *United States* v. *Kiffer, supra*, 477 F. 2d at 356:

> [T]here is a body of scientific opinion that marihuana is subject to serious abuse in some cases, and relatively little is known about its long-term effect. Congress was advised by HEW that determination of the seriousness of these potential hazards would require further study, and in the meantime Congress was certainly not precluded from taking a cautious approach.

Congress' decision is not subject to judicial reassessment, and the fact that some experts disagree with Congress' conclusion does not require a court to hold an evidentiary hearing. Cf. *Whalen* v. *Roe*, 429 U.S. 589, 597; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 20-34.[6]

[6]See also *United States* v. *Gramlich, supra*, 551 F. 2d at 1364. Moreover, petitioner had an opportunity to seek administrative reclassification of marijuana under the procedure provided by 21 U.S.C. 811(a). He did not take advantage of this opportunity.

The United States' treaty obligations under the Single Convention on Narcotic Drugs,[7] which requires signatories to control marijuana, also support the placement of marijuana on Schedule I. See *United States* v. *Rodriquez-Camacho, supra*. 21 U.S.C. 811(d) provides that if control of a substance is required by our obligations under such a convention, "the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, *without regard to the findings required by subsection (a) of this section or section 812(b)* of this title * * *" (emphasis added). Cannabis and Cannabis resin are listed on Schedules I and IV of the Single Convention, which requires that its signatories limit production, distribution, and possession of these substances to authorized medical and scientific purposes, and also requires that signatories impose certain penal restrictions for violations of these limitations. To meet the requirements of the Single Convention, Cannabis cannot be classified lower than Schedule II of the Controlled Substances Act. See *National Organization for Reform of Marijuana Laws* v. *Drug Enforcement Administration*, 559 F. 2d 735, 739-740, 750-752 (C.A.D.C.).

2. If, as we contend, Congress properly may prohibit the commercial distribution of marijuana, then it necessarily follows that there is nothing to petitioner's objections to the penalty provisions that led to the sentence of ten years' imprisonment for distributing tons of that substance over extended periods.

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[7]The Single Convention was opened for signature March 30, 1961. 18 U.S.T. 1407, T.I.A.S. No. 6298. The United States ratified the Convention in 1967.

Petitioner urges (Pet. 25-26) that prior decisions upholding the classification of marijuana, such as *United States* v. *Kiffer, supra*, were based in part on the fact that Congress distinguished between marijuana and other Schedule I drugs in the maximum penalty for unlawful distribution. He contends that, because Section 848 does not distinguish between marijuana and other Schedule I drugs, it violates the equal protection component of the Due Process Clause.

But the focus of Section 848 is the nature of the criminal enterprise, not the identity of the drug involved. That Section provides that persons engaged in a continuing criminal enterprise with five or more other persons committing felony violations of the Controlled Substances Act from which substantial profits are derived shall, on conviction, be sentenced to not less than ten years in prison, be fined as much as $100,000 and be required to forfeit all profits obtained in that enterprise. Section 848 "is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation." H.R. Rep. No. 91-1444, *supra*, at 10.

Petitioner was the central figure of an organization distributing tons of marijuana throughout the United States. The organization met the criteria provided by the statute. Congress could properly use especially high penalties to deter those who make a continuing business of distributing enormous quantities of drugs that cannot lawfully be distributed in any quantities.[8]

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[8]Congress followed the advice of the President's Advisory Commission on Narcotic and Drug Abuse (the Prettyman Commission), which recommended that "[t]he illegal traffic in drugs should be

Petitioner also urges (Pet. 14-21) that subjecting him to the same 10-year minimum sentence, with no possibility of parole, that would have applied if his organization had sold heroin is cruel and unusual punishment.[9] But the sentence imposed here is neither barbaric nor excessive in relation to petitioner's long-term flouting of the laws. A punishment is excessive in the constitutional sense only if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker* v. *Georgia*, No. 75-5444, decided June 29, 1977, slip op. 7. Imposition of a stiff minimum penalty on those who engage in organized disregard for society's laws in exchange for substantial profits—whichever drug they receive the profit from—is not excessive under this standard.[10]

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attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive." H.R. Rep. No. 91-1444, *supra*, at 9.

[9]Petitioner's related contention that the mandatory minimum sentence invades judicial or executive prerogatives is insubstantial. With the exception of the President's pardoning power (see *Schick* v. *Reed*, 419 U.S. 256), and subject to the limitation in the Eighth Amendment, the Constitution requires both courts and the Executive Branch to abide by sentencing ranges selected by Congress. Courts have sentencing discretion only within the legislatively-selected range, and the Executive Branch must carry out sentences that courts lawfully impose. See *Ex parte United States*, 242 U.S. 27.

[10]The state cases relied on by petitioner (Pet. 15) did not involve extensive commercial distribution and, in any event, were based on state constitutional provisions. Federal cases uniformly have sustained the constitutionality of Section 848. See, *e.g.*, *United States* v. *Bergdoll*, 412 F. Supp. 1308 (D. Del.); cf. *United States* v. *Maiden*, 355 F. Supp. 743 (D. Conn.).

3. Finally, petitioner urges (Pet. 34-36) that the no-parole provision of Section 848 lapsed. The provision under which petitioner was sentenced (21 U.S.C. 848(c)) states:

> In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 * * * shall not apply.

The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, revised Chapter 311 of Title 18 (which deals with parole) effective May 14, 1976. It moved the basic parole eligibility rules from Section 4202 to Section 4205; Section 4202 now deals with the creation of the Parole Commission. Section 848 has not been amended to refer to Section 4205.

The Parole Commission and Reorganization Act does not purport to repeal no-parole provisions of other laws. It is unfortunate that Congress did not revise statutory cross-references when changing the numbering of the sections in Chapter 311, but this oversight does not negate the intent of Congress clearly expressed in Section 848.[11] It has long been settled that recodifications and revisions of existing statutes do not repeal substantive provisions unless Congress unambiguously intended to do so. *Muniz* v. *Hoffman*, 422 U.S. 454, 467-474; *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 309 n. 12. There is no such intent here; to the contrary, Congress provided in 18

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[11]The House Report on the Controlled Substances Act made it clear that the reference in Section 848 to Section 4202 was intended to preclude persons convicted of conducting a continuing criminal enterprise from becoming eligible for parole. H.R. Rep. No. 91-1444, *supra*, at 50.

U.S.C. 4205(h) that the new statute does not alter existing no-parole provisions. See also *Frady* v. *Bureau of Prisons*, C.A. D.C., No. 77-1497, decided January 9, 1978.

In any event, under 1 U.S.C. 109, the general savings clause, a defendant's crime is subject to the punishment provisions in effect when he committed the offense, even if legislation reducing the penalty is enacted before his sentencing.[12] See *Warden* v. *Marrero*, 417 U.S. 653, 661. Petitioner's crime was committed before May 14, 1976, and the reference in Section 848 to Section 4202 must be construed as a reference to Section 4202 as it existed when petitioner committed his crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978.

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[12] Section 109 provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute * * *.